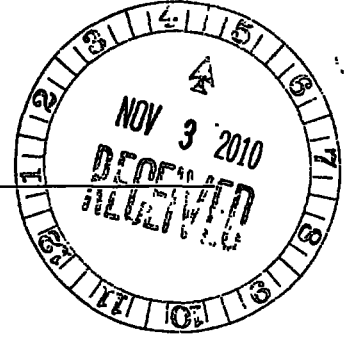


PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD



TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.; CAROLINA
PIEDMONT DIVISION; GEORGIA
WOODLANDS RAILROAD, LLC; MADISON
RAILROAD; MOHAWK ADIRONDACK &
NORTHERN RAILROAD CORP.; NASHVILLE &
EASTERN RAILROAD CORP.; NEW HOPE &
IVYLAND RAILROAD; PIONEER VALLEY
RAILROAD; R.J. CORMAN RAILROAD
COMPANY (MEMPHIS); SEMINOLE GULF
RAILWAY L.P.; SEQUATCHIE VALLEY
RAILROAD COMPANY; AND SOUTH BRANCH
VALLEY RAILROAD

Defendants.

Docket No. NOR 42121

ENTERED
Office of Proceedings

NOV 03 2010

Part of
Public Record

**CSX TRANSPORTATION, INC.'S MOTION FOR LEAVE TO FILE RESPONSE TO
CERTAIN ALLEGATIONS IN REPLY TO MOTION FOR EXPEDITED
DETERMINATION OF JURISDICTION OVER CHALLENGED RATES**

Defendant CSX Transportation, Inc. ("CSXT") respectfully requests leave to file the attached Response to certain allegations in the Reply filed by Complainant Total Petrochemicals USA, Inc. ("TPI") to CSXT's Motion for Expedited Determination of Jurisdiction Over Challenged Rates ("Reply") about the prior work of CSXT expert Gordon Heisler for TPI. In an apparent attempt to discredit Mr. Heisler's expert testimony, TPI's Reply presents an incomplete and incorrect account of Mr. Heisler's extremely limited prior contact with TPI. CSXT requests leave to file the attached response in order to correct the record.¹

¹ CSXT's Response, supported by the Verified Statement from Mr. Heisler, is attached as Exhibit A to this Motion.

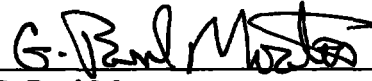
CSXT's response also reiterates CSXT's request for an oral argument on its Motion for Expedited Determination of Jurisdiction Over Challenged Rates.

While the Board's general practice is to disallow a reply to a reply, the Board has permitted surreplies when necessary to establish a complete record and ensure a just determination of the issues presented.² Here, where TPI's reply contains incorrect statements designed to create the misleading impression that there is some impropriety in Mr. Heisler presenting expert testimony in this case, it is appropriate for the Board to allow CSXT and Mr. Heisler to present evidence that tells the complete story of the prior engagement that TPI claims to find "troubling." Reply at 12.

For these reasons, CSXT respectfully requests leave to submit the attached Response to Allegations in TPI's Reply to Motion for Expedited Determination of Jurisdiction Over Challenged Rates.

² See, e.g., *Allied Erecting & Dismantling, Inc. – Petition for Declaratory Order – Rail Easements in Mahoning County, Ohio*, STB Fin. Docket No. 35316, at n.2 (June 23, 2010) (accepting two replies to replies "in order to establish a more complete record"); *City of Alexandria, VA – Petition for Declaratory Order*, STB Fin. Docket No. 35157 (Nov. 6, 2008) (allowing reply to reply "[i]n the interest of compiling a full record"); *Holrail, LLC – Construction & Operation Exemption – In Orangeburg & Dorchester Ctys., SC*, STB Finance Docket No. 34421 (Feb. 12, 2007) (allowing reply to reply "to ensure a just determination of the issues presented").

Respectfully submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Noah A. Clements
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

Dated: November 3, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2010, I caused a copy of the foregoing Motion for Leave to File Response to Certain Allegations in Reply to Motion for Expedited Determination of Jurisdiction Over Challenged Rates to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036



Eva Mozena Brandon

EXHIBIT A

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.; CAROLINA
PIEDMONT DIVISION; GEORGIA
WOODLANDS RAILROAD, LLC; MADISON
RAILROAD; MOHAWK ADIRONDACK &
NORTHERN RAILROAD CORP.; NASHVILLE &
EASTERN RAILROAD CORP.; NEW HOPE &
IVYLAND RAILROAD; PIONEER VALLEY
RAILROAD; R.J. CORMAN RAILROAD
COMPANY (MEMPHIS); SEMINOLE GULF
RAILWAY L.P.; SEQUATCHIE VALLEY
RAILROAD COMPANY; AND SOUTH BRANCH
VALLEY RAILROAD

Defendants.

Docket No. NOR 42121

**CSX TRANSPORTATION, INC.'S RESPONSE TO CERTAIN ALLEGATIONS IN
REPLY TO MOTION FOR EXPEDITED DETERMINATION OF JURISDICTION
OVER CHALLENGED RATES**

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this Response to certain allegations in the Reply filed by Complainant Total Petrochemicals USA, Inc. ("TPI") to CSXT's Motion for Expedited Determination of Jurisdiction Over Challenged Rates ("Reply"). TPI's Reply makes a number of misstatements and flawed arguments that fall significantly short of its burden of demonstrating that CSXT is market dominant over the challenged movements. CSXT is not responding to the vast majority of TPI's arguments, because the Board's ordinary practice does not permit replies to replies. However, with the Board's leave, CSXT does submit this response to misleading statements in TPI's Reply about

the prior work of CSXT expert Gordon Heisler for TPI. As demonstrated below and in Mr. Heisler's attached verified statement, TPI's Reply significantly exaggerates and misstates the scope of Mr. Heisler's work for TPI, which consisted of {{

}} In addition to correcting the record on this point, CSXT reiterates its request for oral argument on its Motion for Expedited Determination of Jurisdiction Over Challenged Rates. CSXT respectfully submits that oral argument would help in the Board's consideration of whether it should address the significant market dominance issues presented by this case before the parties prepare what will be particularly voluminous and complex SAC evidence.

While TPI claims that there is something "troubling" about Mr. Heisler working for CSXT in 2010 after he worked for TPI in 2007, TPI provides almost no detail about the actual scope of Mr. Heisler's prior work for TPI. Reply at 12. There is a good reason for this. The truth is that Mr. Heisler had very limited prior contact with TPI, and that indeed the entire scope of his work was {{

}} See Verified Statement of Gordon Heisler ("V.S. Heisler") at 2-3. More significantly for purposes of this case, Mr. Heisler was never engaged by TPI to provide advice on the subject of his testimony in this case: whether TPI has effective competitive transportation alternatives to CSXT rail service. See *id.* at 1. TPI never asked Mr. Heisler to evaluate whether any particular lanes of traffic handled by CSXT could be competitively transported via alternative rail carriers, truck transportation, or rail-truck transloading. If TPI had done so, Mr. Heisler testifies that he would have reached the same conclusions set forth in his Verified Statement in support of CSXT's Motion for Expedited Determination of Jurisdiction

Over Challenged Rates: that TPI does have competitive transportation alternatives for many of the lanes whose rates it challenges in this case. *See id.* TPI's claim that Mr. Heisler "argues one set of facts when working for TPI and another set for working for CSXT" is therefore completely groundless and unfair to him. Reply at 13.

As. Mr. Heisler's Verified Statement explains, for several years he has worked as a consultant specializing in transportation and logistics issues, and some of that consulting work has been through Professional Logistics Group ("PLG"). *See* V.S. Heisler at 2. In 2007 Mr. Heisler was asked by PLG's president Graham Brisbin to {{

}}

After returning to the United States on May 29, 2007, Mr. Heisler attended a meeting with TPI in Houston on May 30, 2007. *See id.* at 2. {{

}}

While TPI attaches to its Reply a confidentiality agreement signed by the President of PLG, TPI does not even attempt to argue that Mr. Heisler violated that agreement. As Mr. Heisler explains, {{

}} *See id.* at 2-3. In preparing his testimony for this case, Mr. Heisler did not review, use, or rely on any information received from TPI during the course of his limited 2007 engagement. *See id.* at 3. Rather, he relied on the factual sources set forth in his verified statement and workpapers filed October 1, 2010, which consisted of information produced by TPI in discovery, information provided by CSXT, and information that Mr. Heisler developed using his own contacts in the business and his own factual research. *See id.*

In sum, none of the limited discussions Mr. Heisler had with TPI in 2007 is inconsistent with the expert opinion he has provided in this case, and there is no merit to TPI's suggestion that his participation in a one-day discussion with TPI over three years ago somehow casts doubt on his well-documented opinions here.


As discussed above, CSXT is limiting this response to a rebuttal of TPI's allegations about Mr. Heisler. In doing so, CSXT wishes to make clear that it has serious disagreements with many of the other statements and allegations in TPI's Reply. CSXT continues to believe that the Board should schedule oral argument on CSXT's Motion to address the parties' competing arguments. CSXT notes that the many arguments TPI raises cannot obscure the undeniable facts that the issue commodities are highly amenable to rail-truck transloading and that TPI regularly uses truck transportation and rail-truck transloading.³

³ To take one example, TPI's claims that NS's Doraville transloading facility lacks capacity to handle rail-truck transloading for all of TPI's customers in the area misses the point. *See Reply* at 20-21. The Doraville facility is just one of several other Atlanta-area transloading facilities

Moreover, an oral argument would allow the Board to consider important questions that TPI's Reply raises about the appropriate application of the statutory market dominance requirement – specifically, the extent to which a complainant can manufacture market dominance by adopting policies that allegedly limit its options to rail service.⁴ An oral argument would allow the Board to explore these important policy issues and avoid the potentially wasteful exercise of having the parties prepare SAC evidence for what may be the most complex Stand Alone Railroad the Board has ever seen, despite the existence of serious questions as to whether the Board has jurisdiction over many of the challenged rates.

Respectfully submitted,

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202


G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Noah A. Clements
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to CSX Transportation, Inc.

Dated: November 3, 2010

TPI could use to serve customers in the area; for example, the PAX Industries terminal in Norcross could also be used to transload plastic pellet shipments.

⁴ For example, TPI claims that it cannot make further use of rail-truck transloading because it has adopted a policy to target an “optimal” number of {{ }} transloading facilities, and it claims that transload facilities cannot be used unless they meet certain TPI-determined requirements.

HEISLER V.S.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant

Docket No. NOR 42121

VERIFIED STATEMENT OF GORDON R. HEISLER

My name is Gordon R. Heisler, and I submit this Verified Statement to respond to certain allegations made by Complainant TOTAL Petrochemicals, USA (“TPI”) in its Reply to Defendant CSX Transportation, Inc.’s (“CSXT”) Motion for Expedited Determination of Jurisdiction Over Challenged Rates. Specifically, this Verified Statement responds to TPI’s claims that the testimony is somehow inconsistent with prior work I performed with TPI or somehow violates a confidentiality agreement with TPI. TPI substantially exaggerates and mischaracterizes my very limited prior contact with it, which entirely consisted of {{

}} More importantly, TPI never asked me to perform any work to evaluate its competitive transportation options. Had TPI done so, I would have reached the same conclusions set forth in my Verified Statement in support of CSXT’s Motion for Expedited Determination of Jurisdiction Over Challenged Rates: TPI has effective competitive alternatives to CSXT rail service for many of the lanes challenged in the complaint.

As I detailed in my previous Verified Statement, I have 38 years of experience in surface transportation and logistics, a large portion of which related to chemicals and plastics distribution for Sunoco, Inc. ("Sunoco") and for FMC Industrial Chemicals. I directed Sunoco's transportation group for approximately 13 years before retiring from that company in 2005. After my retirement from Sunoco I have worked as a consultant specializing in transportation and logistics issues. Some of that consulting work has been through Professional Logistics Group ("PLG").

During May 2007 I vacationed in Italy for several weeks. While on vacation I received emails from Graham Brisbin, President of PLG, requesting that I {{

}}

I returned to the United States in the late afternoon on May 29. {{

}} The next morning, May 30, 2007, I took a 6:00 AM flight from Philadelphia to Houston {{

}}

{{

}}

In preparing my testimony for this case, I did not review, use, or rely on any information received from TPI during the course of the limited 2007 engagement described above. {{

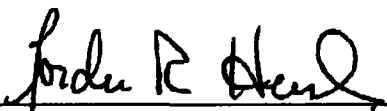
}} Moreover, none of the limited work I did for TPI in 2007 is inconsistent in any way with the expert opinion I have provided in this case.

What I did rely upon in preparing my testimony in this case was information produced by TPI in discovery, information provided by CSXT, and information that I developed using my own contacts in the business and my own factual research.

VERIFICATION

I, Gordon R. Heisler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 1st day of November, 2010.



Gordon R. Heisler